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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

MAY 5 1997

Federal Communications Commission  
Office of the Secretary

In the Matter of )  
 )  
American Communications Services, Inc. )  
 )  
Petition for Expedited Declaratory ) CC Docket No. 97-100  
Ruling Preempting Arkansas Public )  
Service Commission Pursuant to Section )  
252(e)(5) of the Communications Act )  
of 1934, as amended )

**COMMENTS OF THE ASSOCIATION FOR  
LOCAL TELECOMMUNICATIONS SERVICES**

The Association for Local Telecommunications Services ("ALTS")<sup>1</sup>, pursuant to Public Notice DA 97-652, released April 3, 1997, hereby submits its Comments in support of the Petition for Declaratory Ruling filed by American Communications Services, Inc. ("ACSI") asking the Commission to preempt the Arkansas Public Service Commission from arbitrating and approving interconnection agreements and from refusing requests by competitive local exchange carriers ("CLECs") for designation as carriers qualified to receive universal service support.

**I. INTRODUCTION AND SUMMARY**

The Arkansas Telecommunications Regulatory Reform Act of 1997 (the "Arkansas Act") clearly seeks to limit competitive entry into local telecommunications wherever possible. It is so

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<sup>1</sup> ALTS is the national trade association representing more than thirty facilities based competitive local exchange carriers.

blatantly anti-competition and violates the very precepts of the '96 Act in such a manner that the Commission is left with no alternative than to grant the motion filed by ACSI. When a statute so clearly attempts to undermine a clear federal policy articulated by Congress, it cannot be saved by a few phrases such as "except as prohibited by federal law" and "except to the extent required by the Federal Act."

Despite these attempts to mitigate the anti-competition provisions in the Arkansas Act, the Act clearly will have a severe chilling effect upon the Arkansas Public Service Commission that would make it impossible for the Arkansas Commission to perform the duties that the Telecommunications Act demands of it under Sections 251, 252 and 254.<sup>2</sup> Thus, the Federal Communications Commission must perform those acts. If the FCC does not step up to its obligation in this instance it will be faced with even greater problems in the future. In a number of states, legislators who seek to protect incumbent local exchange carriers ("ILECs") from the competition clearly envisioned by the '96 Act have introduced legislation similar to that passed in Arkansas. Should such legislation become law in those states, the FCC is certain to be faced with numerous other requests for preemption.

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<sup>2</sup> In other instances, the Arkansas Act expands the Arkansas PSC's authority in ways not allowed under the '96 Act. See the discussion relating to rural ILECs infra.

II. THE COMMISSION HAS THE AUTHORITY TO ASSUME JURISDICTION OVER INTERCONNECTION AGREEMENTS AND IMPLEMENTATION BECAUSE THE ARKANSAS ACT PREVENTS THE ARKANSAS COMMISSION FROM PERFORMING ITS DUTIES IN A MANNER CONSISTENT WITH THE SPIRIT AND THE LETTER OF THE '96 Act.

Section 252(e)(5) of the '96 Act provides that the FCC "shall issue an order preempting the State commission's jurisdiction" in a mediation, arbitration or other proceeding involving interconnection negotiations if the State Commission "fails to act to carry out its responsibility" under Section 252. Although the Arkansas PSC has not yet "failed" to act the legislature has taken away its ability to act. In such circumstances, the Commission need not wait until the PSC has actually failed to act. Preemption is proper now.

The clear intent of the Arkansas Act is to blunt the impact of the '96 Act and to protect incumbent local exchange carriers ("ILECs") from competition in a manner inconsistent with that Act. The Arkansas Public Service Commission is, in effect, prevented from performing any discretionary actions left to it under the Federal statute by a statute that creates an environment that is antagonistic to competition in the local market and to the Commission taking any pro-competition actions.

In addition to the sections of the Arkansas Act enumerated in the ACSI petition that demonstrate the inability of the Arkansas Commission to perform the duties assigned to it by the Federal law, several additional sections of the Arkansas Act

directly contravene Federal law. Section 9(I) of the Arkansas Act provides that

The Commission shall approve any negotiated interconnection agreement or statement of generally available terms filed pursuant to the Federal Act unless it is shown by clear and convincing evidence that the agreement or statement does not meet the minimum requirements of Section 251 of the Federal Act. . . . [emphasis added]

The '96 Act, on the other hand, allows a state commission to reject a negotiated agreement if it finds that "the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or the implementation of such agreement . . . is not consistent with the public interest . . . ." <sup>3</sup> In addition, unlike the Arkansas Act, the '96 Act does not require that there be "clear and convincing evidence" before a state commission may reject a negotiated agreement. "Clear and convincing" evidence is a higher standard than state regulatory commissions generally base their decisions upon. <sup>4</sup> Therefore, the effect of the Arkansas act is to severely limit the Arkansas Commission's review of Section 251 interconnection agreements.

With respect to the obligations of rural ILECs the Arkansas Act is also in conflict with the '96 Act. The '96 Act grants an exemption from the requirements of Section 251(c) to rural ILECs until the state commission makes certain findings. <sup>5</sup> Section

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<sup>3</sup> 47 U.S.C. § 252(e) (2) (A) .

<sup>4</sup> Most administrative law decisions are based upon the "preponderance of the evidence" standard.

<sup>5</sup> See 47 U.S.C. § 251(f) (1) .

10(b) of the Arkansas Act requires similar findings but adds an additional hurdle that the state commission must clear before requiring a rural ILEC to comply with the requirements of Sections 251(c) and 252.<sup>6</sup> Specifically, the Arkansas Act requires the Commission to find, by "clear and convincing evidence," that the "request is consistent . . . with the public interest, convenience and necessity."

While the "public interest, convenience and necessity" test is familiar to all persons involved in telecommunications regulation, the Arkansas Act is very explicit about what the Arkansas Commission must consider in making such a determination. Among other things the state commission is forbidden to find that there is clear and convincing evidence that the request is consistent with the public interest unless the Commission has concluded that the requested relief would not result in significant adverse impact on 1)the customers of the ILEC, 2)the ILEC's continuing ability to provide adequate service at reasonable rates, 3)the ILEC's ability to continue to meet eligible carrier obligations, 4)statewide average toll rates, 5)the goals of universal service, and 6)the ability of the ILEC to attract capital and incur debt. These requirements make it virtually impossible for the state commission to find that it is in the public interest to apply the Section 251(c) interconnection requirements to rural ILECs.

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<sup>6</sup> Section 252 includes interconnection requirements beyond those in Section 251(c).

Finally, Section 10(d) of the Arkansas Act provides that if no order granting a request is entered by the Commission within 120 days, the request is denied. Thus, the Arkansas Act severely inhibits the state commission's ability to satisfy Sections 251 and 252 of the '96 Act with respect to rural telephone companies.

**III. THE UNIVERSAL SERVICE PROVISIONS OF THE ARKANSAS ACT CLEARLY CONFLICT WITH THE UNIVERSAL SERVICE PROVISIONS OF THE '96 Act.**

Section 254(f) of the '96 Act allows states to adopt regulations not inconsistent with the FCC's rules to preserve and enhance universal service. Therefore, by implication, any state universal service statute or regulation inconsistent with the '96 Act is preempted.

The Arkansas Act has a number of restrictions and limitations that severely limit the ability of any entity other than the ILEC to receive either federal or state universal service funds. The Arkansas universal service provisions are extremely antagonistic to the concept of more than one carrier being eligible for universal service support in Arkansas. The '96 Act, on the other hand, clearly contemplates that there may be a number of "eligible carriers" in any area.<sup>7</sup>

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<sup>7</sup> For example, the Arkansas Act provides that the incumbent local exchange carrier "shall be the eligible telecommunications carrier within its local exchange area." In addition, the Arkansas Act provides that the state commission "may designate" additional eligible carriers while the '96 Act requires states to find that carriers complying with certain requirements are "eligible" ("A State commission shall . . . designate"). Along

In addition to the general antagonism of the Arkansas Universal Service provisions towards any carrier other than the ILEC being designated as an eligible carrier, there are numerous areas in which the Arkansas Act specifically conflicts with, and is more limited and restrictive than, the '96 Act. First, the '96 Act clearly requires the state commissions to designate the service area for which a carrier will be an eligible carrier. There are no limitations put on the area that can be designated and the '96 Act contemplates that a carrier could be an eligible carrier for an area different from the service area of the ILEC. Thus, a competing carrier may be an "eligible carrier" for the same area as an ILEC, a smaller area, a larger area, or just a different area. Under the '96 Act a competing carrier is not tied to the area that the incumbent happens to serve. The Arkansas Act, on the other hand, requires the service area for which a carrier is an eligible carrier to be the same as the service area of the incumbent.<sup>8</sup>

Second, the Arkansas Act provides that universal service support "will not begin until the [carrier] has facilities in

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these same lines, the Arkansas Act provides that the state commission may only designate a carrier to be an "eligible carrier" if it is determined that the "designation is in the public interest." In contrast, the '96 Act, requires a finding that the designation is in the public interest only for carriers serving rural areas.

<sup>8</sup> While not entirely clear, Section 9 might also be read as restricting a competitive carrier to the same service area as served by the incumbent.

place . . . ."<sup>9</sup> There is no such limitation in the '96 Act.

Third, the Arkansas Act restricts funding to the portion of the carrier's facilities that it "owns and maintains." Again, there is no such restriction in the '96 Act. In addition, such a restriction is inconsistent with the '96 Act which states that another carrier may be eligible for support if it offers service "either using its own facilities or a combination of its own facilities and resale of another carrier's services . . . ."<sup>10</sup>

Fourth, the Arkansas Act provides that no carrier may receive Universal Service funding "at a level higher than the level of funding received by the incumbent local exchange carrier in the same area."<sup>11</sup> Again, there is no such restriction in the '96 Act and such a restriction makes no sense, especially if the competitive carrier serves an area different than that served by the ILEC.

With respect to Universal Service subsidies to rural areas, the Arkansas Act is also in direct conflict with the '96 Act. The Federal law provides that a state commission may designate a second carrier as an eligible carrier in a rural area if the commission finds that the designation is in the public interest. The Arkansas Act, on the other hand, does not even allow the state commission to consider a carrier's status in many rural areas. Rather, the Arkansas Act states that

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<sup>9</sup> Arkansas Act § 5(b)(1).

<sup>10</sup> 47 U.S.C. § 214(e)(1)(A).

<sup>11</sup> Arkansas Act § 5(b)(3).



For the entire area served by a rural telephone company, excluding Tier One Companies, for the purposes of the [Arkansas Universal Service Fund] and the federal universal service fund, there shall be only one eligible telecommunications carrier which shall be the incumbent local exchange carrier . . . .<sup>12</sup>

Thus, the Arkansas Act has taken away the state commission's ability to consider whether more than one carrier should be an "eligible carrier" in many rural areas. This clearly conflicts with the federal law and thus must be preempted.<sup>13</sup>

Finally, the thrust of the Arkansas Universal Service fund is inconsistent with the Federal Universal Service fund. The Federal Universal Service fund was created to ensure that high cost areas receive the support necessary to ensure that consumers in all areas of the country, rural and urban, can obtain basic service at reasonably comparable rates. While the Arkansas Act articulates the same goal in Section 4(a), Sections 4(e)(4)(A), 4(e)(4)(B), and 4(e)(4)(C) demonstrate that the real goal of the Arkansas Act is to "make whole" any ILEC if competition or any regulatory actions result in a net decrease in its revenues.

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<sup>12</sup> Id. § 5(d).

<sup>13</sup> Finally, there is one other part of the Arkansas statute that appears to conflict with the Federal Universal Service scheme. Section 4(b) of the Arkansas Act provides that "all telecommunications providers, except as prohibited by federal law, shall be charged for the direct and indirect value inherent in the obtaining and preserving of reasonable and comparable access to telecommunications services in the rural and high cost areas." While it is unclear what is meant by the phrase "indirect value inherent in the obtaining and preserving of reasonable . . . access" it appears that such fuzzy language conflicts with the very purpose of the Federal Universal Service section which is to make all Universal Service subsidies explicit and predictable.

# CONCLUSION

If the FCC does not grant the ACSI petition the Arkansas Telecommunications Regulatory Reform Act will result in competition being excluded from Arkansas and the citizens of Arkansas being kept captive to the local telephone monopoly. The Arkansas Act creates significant barriers to entry in the local market, particularly in the rural areas and violates the basic precept of the '96 Act which leaves much of the implementation of that Act to the state commissions.

Respectfully submitted

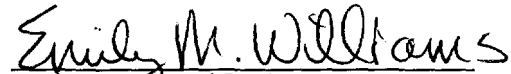
Richard J. Metzger  
General Counsel

By: Emily M. Williams  
Emily M. Williams  
**Association for Local  
Telecommunications Services**  
1200 19th Street, N.W.  
Washington, D.C. 20036  
(202) 466-0658

April 5, 1997

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Comments of the Association for Local Telecommunications Services was served May 5, 1997 on the following persons by first-class mail or by hand service as indicated.

  
Emily M Williams

The Honorable Reed E. Hundt, Chairman\*  
Federal Communications Commission  
1919 M Street, N.W., Room 814  
Washington, D.C. 20554

The Honorable James Quello\*  
Federal Communications Commission  
1919 M Street, N.W., Room 802  
Washington, D.C. 20554

The Honorable Rachelle B. Chong\*  
Federal Communications Commission  
1919 M Street, N.W. Room 844  
Washington, D.C. 20554

The Honorable Susan Ness\*  
Federal Communications Commission  
1919 M Street, Room 832  
Washington, D.C. 20554

Regina Keeney\*  
Chief, Common Carrier Bureau, Room 500  
1919 M Street, N.W.  
Washington, D.C. 20554

Janice Myles  
Room 544, Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

ITS\*  
2100 M Street, N.W. Suite 140  
Washington, D.C. 20554

Brad E. Mutschelknaus  
Kelley Drye and Warren  
1200 Nineteenth Street, NW  
Washington, D.C. 20036